SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 282

LEGH R. POWELL, JR., AND HENRY W. ANDERSON, as Receivers of Seaboard Air Line Railway,

Petitioners,

vs.

J. H. WIGGINS.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

Opinion of the Court Below.

At the time of the preparation of this Petition and Brief, the opinion in this case has not yet been published in the official reports, nor does it appear in the advance sheets of the Federal Reporter. A copy appears at page 91 of the Record.

II.

Jurisdiction.

1. Jurisdiction is invoked under Judicial Code, Section 240, as amended by the Act of February 13, 1925, 43 Stat. 938, 28 U. S. C. A., Section 347.

2. The date of the judgment to be reviewed is May 23, 1941.

3. The nature of the case, and the fact that the rulings below were such as to bring this case within the jurisdictional provisions relied on, are fully disclosed in the petition for writ of certiorari under Subdivisions "A" and "B".

4. The following are the cases relied on to sustain the jurisdiction:

Louisville & N. R. Co. v. *Davis*, 75 F. (2d) 849;
Unadilla Valley Ry. Co. v. *Dibble*, 31 F. (2d) 239;
Unadilla Valley Ry. Co. v. *Caldine*, 278 U. S. 139, 73 L. Ed. 224;
Frese v. *Chicago, B. & Q. R. Co.*, 263 U. S. 1, 68 L. Ed. 131;
Great Northern R. Co. v. *Wiles*, 240 U. S. 444, 60 L. Ed. 732;
Davis v. *Kennedy*, 266 U. S. 147, 69 L. Ed. 212, 45 Sup. Ct. Rep. 33.

Precise Question No. 1.

UNDER THE CIRCUMSTANCES STATED, WAS NOT THE NEGLIGENCE OF THE PLAINTIFF IN FAILING IN HIS DUTY TO OBEY THE RULES OF THE DEFENDANTS AND KEEP A LOOKOUT FOR THE OPEN SWITCH SO AS TO AVOID RUNNING THE MOTOR CAR INTO IT THE SOLE PROXIMATE CAUSE OF HIS INJURIES OF WHICH HE COMPLAINS?

Repetition of the facts set out in the petition will not be here repeated.

From the decision of the Circuit Court of Appeals it is found that the court entirely overlooked Rule 1170 and 1160 set out in the petition, and also pages 12 and 13 of the record, and the court seems to come to the conclusion that Wiggins' eyesight was defective, basing it on the fact that in the court room without his glasses he was unable to see

some photographs. R. 34, 35, whereas Wiggins detailed the positions showing that he was sitting out ahead, R. 27, and R. 30 shows the purpose of keeping a lookout. In answer to his Interrogatory, R. 49, No. 24, he said "I do not mean to state by this answer that had I been actually operating the car I would not have observed the danger at an earlier time". Naturally he wouldn't say how much earlier, and on page 51, Interrogatory 34, he says the weather condition was sufficiently clear to permit of safe operation and that the target was observable at three or four hundred feet, R. 52, No. 40.

Then Moore's testimony shows that Wiggins was up in front of him and he couldn't properly observe the track and was apparently depending on Wiggins (R. 60-61).

From the definition of proximate cause, which we believe is as good as can be found, in *Jaggers* v. *Southeastern Greyhound Lines,* 34 Fed. Sup. 667 as follows:

> "Proximate cause has been defined by many courts with many definitions. A practical construction placed upon the term by many courts is a cause from which a man of ordinary experience and sagacity could foresee that the result might probably ensue. *A proximate cause is one where the effect was absolutely necessary.* That is, given the cause, the resultant effect is a necessity. This is the difference in a proximate cause and a remote cause. The remote cause is one where the effect is uncertain, vague, or indeterminate. *It is a cause where the effect does not necessarily follow.* The proximate cause must be active, operating and carrying and containing within, the possibility and potentiality for harm."

and the statement in the case in regard to conditions as follows:

> "There is ample authority for a distinction between a situation that might be a proximate cause and one which is merely a condition. 4 Blashfield's Cyclopedia

> of Automobile Law and Practice. Perm. Ed. Section 2535; Taylor *v.* Taylor, 144 Tenn. App. 101; Geisen *v.* Luce, 1932, 185 Minn. 479, 242 N. W. 8."

we feel confident that the decision of the Circuit Court of Appeals is clearly within the Petition for Certiorari. On creating conditions see:

Hudson v. *Norfolk & W. Ry. Co.*, 146 S. E. 525 (W. Va.);
Bacon v. *Payne*, 190 N. W. 716 (Mich.);
So. Ry. v. *Pearce*, 145 S. E. 154 (Ga.).

In the case of *Louisville & N. R. Co.* v. *Davis*, 75 F. (2d) 849, we find this language:

> "That Davis could not reasonably have anticipated the precise manner in which the injury would occur in not controlling. IT IS SUFFICIENT THAT A GENERALLY DANGEROUS SITUATION WAS FORESEEABLE."

Clearly the situation was foreseeable and clearly the leaving of the switch open created a condition; clearly under the rules it was a condition that the section foreman was bound to look out for under Rule 1170; it was clearly a condition that he must know under Rule 1160. The photographs, pages 55-58, show plainly the situation.

Wiggins never complained he couldn't see the target nor he couldn't see the open switch and if he couldn't see, what was he doing up in front trying to keep a lookout?

Plainly Wiggins failed to observe the rule and brings himself within the cases cited, *supra*, under jurisdiction to which we refer without again repeating, and cite the following:

Paster v. *Pa. R. R.*, 43 F. (2d) 908;
Pere Marquette Ry. v. *Haskins*, 62 F. (2d) 806;
Unadilla Valley Railway v. *Dibble*, 31 F. (2d) 239, C. C. A. 2nd. Ct.;
Reynolds v. *N. Y. O. & W. Ry. Co.*, 42 F. (2d) 164;

Great Northern R. Co. v. *Wiles,* 240 U. S. 444, 60 L. Ed. 732;
McCalmont et al. v. *Pennsylvania R. Co.,* 283 Fed. 736;
Buie v. *Powell,* 1 S. E. 2nd. 102.

We feel that the rules laid down are specific rules and being thus are controlled by the decision of the Circuit Court of Appeals, Fifth Circuit in the case of

Atchison T. & S. F. Ry. Co. v. *Ballard,* 108 F. (2d) 768.

The second precise question involved is:

WHEN PLAINTIFF PERMITTED ONE OF THE SECTION HANDS UNDER HIM, IN VIOLATION OF THE RULES, TO OPERATE THE MOTOR CAR AT THE TIME AND PLACE OF THE ACCIDENT, AND THE CONDITION OF THE SWITCH WAS PLAINLY OBSERVABLE AND PLAINTIFF PLACING HIMSELF IN FRONT OF THE ACTUAL OPERATOR SO THAT HE COULD NOT PROPERLY OPERATE THE MOTOR CAR, DID NOT THE PLAINTIFF THUS ASSUME THE RISK ATTENDANT THEREON?

This is very closely allied and related to the first one and the cases over-lap to considerable extent.

It is said in the case of:

Louisville & N. R. Co. v. *Brown,* 81 So. 156, 77 Fla. 64,

quoting from

S. A. L. Ry. Co. v. *Horton,* 238 U. S. 492, text 504, 34 Sup. Ct. 635, 56 L. Ed. 1062,

as follows:

> "While an employe assumes the risks and dangers ordinarily incident to the employment in which he voluntarily engages, so far as these are not attributable to the negligence of the employer or of those for whose conduct the employer is responsible, the employe has a right to assume that the employer has exercised proper care with respect to providing a reasonably safe place of work (and this includes care in establish-

ing a reasonably safe system or method of work) and is not to be treated as assuming a risk that is attributable to the employer's negligence until he becomes aware of it, *or it is so plainly observable that he must be presumed to have known of it.* The employe is not obliged to exercise care to discover dangers not ordinarily incident to the employment, but which result from the employer's negligence."

See also:

McFarland v. *C. & O. Ry. Co.*, 177 Ky. 551, 197 S. W. 944.

From these authorities we feel that the right to have the Petition granted has been sustained.

Respectfully submitted,

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